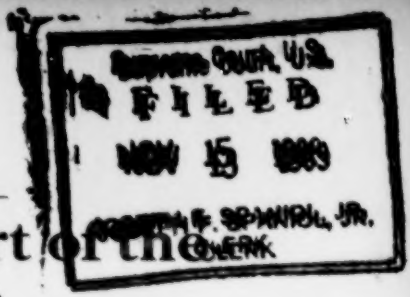
89-769



No. 89- _____

In the Supreme Court of the United States

October Term, 1989

TEXAS APPAREL CO.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

S. RICHARD SHOSTAK
ROBERT GLENN WHITE
STEIN SHOSTAK SHOSTAK AND O'HARA
Counsel of Record for Petitioner
3580 Wilshire Boulevard, Suite 1240
Los Angeles, California 90010
Telephone: (213) 384-2850

JAMES A. GERAGHTY
DONOHUE AND DONOHUE
Co-counsel for Petitioner
26 Broadway - Suite 1111
New York, New York 10004
Telephone: (212) 269-2330

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTIONS PRESENTED FOR REVIEW

1. Does the judicial deference doctrine restated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), and refined in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207 (1987), apply to substantive revenue statutes?

2. Should a specialized court such as the United States Court of International Trade defer to agency interpretation of statutes within the court's subject matter jurisdiction?

3. Does the judicial deference doctrine extend to pure questions of statutory construction as inferred by the United States Court of Appeals for the Federal Circuit in this case, or only to agency construction of statutes as applied to specific facts, as stated by, *inter alia*, the United States Court of Appeals for the District of Columbia Circuit in *Union of Concerned Scientists v. U.S. NRC*, 824 F.2d 108 (D.C. Cir. 1987), and *International Union UAW v. Brock*, 816 F.2d 761 (D.C. Cir. 1987)?

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No. 89-_____

In the Supreme Court of the United States

October Term, 1989

TEXAS APPAREL CO.,

Petitioner,[1]

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

The petitioner seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Federal Circuit entered on August 15, 1989, affirming the denial by the trial court, the United States Court of International Trade, of the petitioner's (plaintiff below) motion for summary judgment, the

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[1]The Petitioner is a division of Salant Corporation. There are no corporate relationships to be identified pursuant to Rule 28.1.

granting of the respondent's (defendant below) cross motion for summary judgment, and the dismissal of the action.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit in *Texas Apparel Co. v. United States*, ____ Fed. Cir. (T) ____, 883 F.2d 66 (1989) is reproduced in the Appendix at A-1. The decision and judgment of the United States Court of International Trade affirmed by the Federal Circuit, *Texas Apparel Co. v. United States*, ____ CIT ____, 698 F. Supp. 932 (1988), is reproduced in the Appendix at A-3.

JURISDICTION

The Court has jurisdiction to review this case by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on August 15, 1989. The Federal Circuit's jurisdiction was predicated upon 28 U.S.C. § 1295(a)(5), while that of the United States Court of International Trade was under 28 U.S.C. § 1581(a).

STATUTORY PROVISION INVOLVED

Tariff Act of 1930, as amended, Section 402(h)(1)(A), 19 U.S.C. § 1401a (h)(1)(A):

(h) Definitions.— As used in this section—

(1)(A) The term "assist" means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:

(i) Materials, components, parts, and similar items incorporated in the imported merchandise.

(ii) Tools, dies, molds, and similar items used in the production of the imported merchandise.

(iii) Merchandise consumed in the production of the imported merchandise.

(iv) Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.[2]

STATEMENT OF THE CASE

This case involves the valuation of imported merchandise for duty assessment purposes. The merchandise, wearing apparel, was imported from July 1, 1980 through May 29, 1981, and was valued at the sum of its production costs under the computed value basis of valuation provided for under 19 U.S.C. § 1401a(e). That basis is part of a Customs valuation statute that was enacted into law as Subtitle A, Title II, of the Trade Agreements Act of 1979, Pub. L. 96--39, 93 Stat. 194, and which became effective on July 1, 1980 (Pres. Proc. No. 4768, 45 Fed. Reg. 45,135 (1980)).

Customs included in the value of the subject merchandise the value of certain general purpose sewing machines which had been provided free of charge by the importer to the foreign manufacturer. Customs' position was that the cost of such general purpose machinery constituted an "assist" within the meaning

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[2]Subparagraph (B) qualifies assist category (iv) by excluding work incidental to other engineering and related tasks undertaken outside the United States by a United States domiciliary employed by the buyer of the imported merchandise. Subparagraph (C) describes the method of valuing category (iv) assists.

of section 402(h)(1)(A)(ii) of the Tariff Act of 1930, as amended by Title II to the Trade Agreements Act of 1979. Specifically, in several interpretative ruling letters, Customs opined that general purpose capital equipment such as sewing machines, drill presses, and ovens, constituted, "tools, dies, molds, and similar items" within the meaning of section 402(h)(1)(A)(ii), *supra*.[3]

The plaintiff importer challenged the valuation in the United States Court of International Trade, arguing that sewing machines are not *ejusdem generis* with tools, dies and molds, that is, they are not similar items of the same class or kind within the meaning of the pertinent assist category, and that the words that accompany or with which the phrase "similar items" is associated, fix a meaning for it that does not include general purpose machinery.

The trial court identified its standard of review in adjudicating the correctness of that interpretation, in the first paragraph of its analysis, as being whether the interpretation by the Customs Service met the fundamental test of being reasonable. App. A-8. Citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and, expressing no view whether the relevant language of the statute is clear or unclear, audible or silent, or unambiguous or ambiguous, the trial court deferred to Customs' interpretation of the statute. Also, the court paraphrased the contentions of the parties, and discussed the basis

[3] *See, e.g.* Customs ruling letter 542122 of September 4, 1980, also designated TAA No. 4 (reproduced in the appendix), and ruling letter 542139 of October 15, 1980, also designated TAA No. 9 (reproduced in the appendix). These rulings were published as C.S.D. 81-64 and C.S.D. 81-91, in 15 Cust. Bull. 862, and 15 Cust. Bull. 920 (1981). The Customs Service stated its view as a conclusion, without analysis or reasoning.

of valuation utilized by Customs, called "computed value," 19 U.S.C. § 1401a(e). It did not discuss the legislative purposes of the definition of "assist," 19 U.S.C. § 1401a(h)(1)(A)(ii). Also, the court addressed the *ejusdem generis* argument, holding that the term "tool" may be defined broadly so as to embrace a machine. The court decided for the defendant.

On appeal, the appellant and *amicus curiae*[4] argued that the lower court improperly deferred to Customs' interpretation of the Tariff Act provision, citing, *inter alia, INS v. Cardoza-Fonseca*, 480 U.S. 421, since the issue involved a pure question of statutory construction which is for the court to decide, employing traditional tools of construction to ascertain congressional intent. Also, the appellant and *amicus curiae*, citing precedent, argued that judicial deference is improper when the agency interpretation is contrary to the clear meaning of a statute, as revealed by its language, purpose, and history. Moreover, *amicus curiae* argued that deference was improper based on the fundamental principle that revenue laws, including tariff acts, are construed strictly against the government and liberally in favor of the taxpayer, and that all ambiguities are resolved in favor of the taxpayer.

On the merits of the statutory interpretation, the appellant and *amicus curiae* cited decisions of the United States Supreme Court applying the rule of interpretation, *noscitur a sociis*, "known by its associates," to tariff provisions to restrict the common meaning of statutory terms. Specifically, the point was that the term "tools" should be confined to those which bear characteristics in common with dies and molds, the other exemplars

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[4]Aris Isotoner, Inc., represented by co-counsel on this petition.

with which it is associated in the statute. Therefore, applying both rules of construction, *noscitur a sociis* and *ejusdem generis,* to Section 402 (h)(1)(A)(ii), general purpose capital machinery would be excluded from the class or kind of articles deemed to be assists. The lower court never considered the *noscitur a sociis* rule of construction. Nevertheless, the Federal Circuit affirmed in a one paragraph opinion in which it implicitly adopted the lower court's opinion as its own, stating that the petitioner had "shown no error" in the trial court's decision, which the Federal Circuit said "specifically, *seriatim*, and correctly disposes" of the arguments made. App. A-2.

The petitioner maintains that the issue was a pure question of statutory construction which the courts should have resolved by employing traditional tools of construction to ascertain congressional intent in the absence of direct evidence from the legislative history. The courts should not have deferred to Customs' interpretation because: (1) revenue statutes are strictly construed against the government and in favor of the taxpayer; (2) unambiguous statutory language still may need to be construed by a court under the plain meaning rule; and (3) assuming *arguendo* some ambiguity, the involved substantive provision did not meet the *Chevron* criteria for deference.

REASONS FOR GRANTING THE WRIT

I.

The Court Should Clarify That The Judicial Deference Doctrine Does Not Apply to Revenue Statutes.

It is axiomatic that revenue laws are construed strictly against the government and liberally in favor of the

taxpayer, and that all doubts or ambiguities are resolved in favor of the taxpayer. 82 C.J.S. *Statutes*, § 306(b); Sutherland *Statutory Construction*, Revenue Legislation § 66.01 citing, *inter alia, Gould v. Gould*, 245 U.S. 151 (1917). This principle applies to tariff statutes. *American Net & Twine Co. v. Worthington*, 141 U.S. 468 (1891) and cases cited. The *American Net & Twine Co.* decision was cited as authority by the Court in *Gould, supra*, for the general principle. The Court has never overruled or limited that principle.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court restated the judicial deference doctrine under which courts should defer to agencies' interpretations of regulatory statutes which they administer. The decision was a landmark insofar as it resolved conflicting applications of the doctrine, and summarized the extant Supreme Court decisions on the issue. However, none of those decisions involved interpretation of a substantive revenue statute.

In this case, the lower court, citing *Chevron*, applied the doctrine to Customs' interpretation of a tariff provision without explaining its propriety and went on to itself interpret the statute broadly beyond the plain meaning of the language used. The petitioner submits that the deference doctrine should not apply to the construction of a revenue statute, and that *Gould, supra*, and *American Net & Twine Co., supra*, continue to reflect the state of the law. The resolution of this issue will affect the interpretation of all revenue statutes.

II.

Courts With Specialized Jurisdiction Should Not Defer to Agency Statutory Interpretations.

None of the decisions cited in *Chevron, supra*, involved

an appeal from a court of specialized jurisdiction. *Chevron* and its progenitors only involved appeals from courts with general jurisdiction. As explained in *Chevron*, the purpose of deference is to prevent the judiciary from usurping functions Congress delegated to an agency. Also, interpretation involves law making, a task better performed by an accountable, rather than an independent, branch of government.

However, by establishing specialized tribunals such as the Court of International Trade, Congress may be deemed to have deliberately entrusted the development of a body of jurisprudence to the judiciary. For example, Congress stated, "The Customs Courts Act of 1980 creates a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the United States Customs Court and the United States Court of Customs and Patent Appeals."[5] H.Rep. No. 96-1235, 96th Cong. 2nd Sess. 20 (1980). The petitioner submits that when Congress creates a specialized court of circumscribed jurisdiction, it accedes to that court's "law making" through statutory interpretation as a natural outgrowth of its expertise. In this case, the Court of International Trade should not have deferred to Customs' interpretation of a substantive tariff provision, but should have fulfilled its mandate to interpret the law.

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[5]The United States Customs Court was the predecessor to the United States Court of International Trade.

III.

The Court Should Resolve a Conflict Between the Circuits On The Interpretation of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as Refined in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

In *Chevron, U.S.A., Inc., supra*, the Court applied the judicial deference doctrine to regulatory statutes which are silent or ambiguous with respect to a particular issue. The Court stated, based on delegation of authority principles, that if a court finds that there is a gap, and if the gap filled by an administrative agency reflects a reasonable interpretation, the reviewing court must defer to it. *Id.*, 467 U.S. at 843-44. The principle was refined in *INS v. Cardoza-Fonseca, supra*, wherein the Court, 480 U.S. at 447-48, explained the principle of *Chevron* by quoting footnote 9 from *Chevron, supra*, 467 U.S. at 843, as follows:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [Citations omitted.] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

The Court in *Cardoza-Fonseca* utilized that principle, iterating that the statute there being construed involved "a pure question of statutory construction for the courts to decide." 480 U.S. at 446.

In several subsequent cases, the circuit courts have understood *Cardoza-Fonseca* as confining judicial deference only to agency interpretations of statutes as

applied to a particular set of facts. *Union of Concerned Scientists v. U.S. NRC*, 824 F.2d 108 (D.C. Cir. 1987); *International Union, UAW v. Brock*, 816 F.2d 761 (D.C. Cir. 1987); *NLRB v. Federal Labor Relations Authority*, 834 F. 2d 191 (D.C. Cir. 1987); *Adams House Health Care v. Heckler*, 817 F. 2d 587, vacated and remanded on other grounds, ____ U.S. ____, 99 L.Ed. 2d 885, *aff'd*, 862 F.2d 1371 (9th Cir. 1988); and *Barrett v. Adams Fruit Co., Inc.*, 867 F.2d 1305 (11th Cir. 1989). While this interpretation of *Cardoza-Fonseca* has been criticized in a recent concurring opinion of this Court, *NLRB v. United Food and Commercial Workers*, 484 U.S. ____, 98 L.Ed 2d 429, 448, the *Chevron* and *Cardoza-Fonseca* doctrine, as herein quoted, obtains in the circuits. *Isaacs v. Bowen*, 865 F.2d 468, 473 (2d Cir. 1989).

The Federal Circuit in this case, by affirming the lower court, inferentially disagreed with the D.C. Circuit's "as applied" approach to deference. Furthermore, the Federal Circuit did not even recognize the ambiguous versus unambiguous distinction expressed by the Court in *Chevron* itself. Rather, by approving judicial deference in a case involving a pure question of statutory construction, the court sanctioned departure from the teaching of *Cardoza-Fonseca*, and placed itself in conflict with the D.C. Circuit. It is appropriate for the Court to resolve the conflict.

In this matter, the trial court and the Federal Circuit have abandoned any test of what standard should be utilized in review of an agency interpretation of a statute. Instead, they have reverted to a policy of presumptively deferring to an agency's construction, if the agency's construction is found to be reasonable.

If this policy of deferring to agency interpretations

of statutes remains the standard for the Court of International Trade, there will be two standards of review, one for agencies whose actions are reviewable in the Federal Circuit, and a different one for all other agencies whose interpretations are reviewable in the District of Columbia Circuit.

The petitioner submits that the involved provision is plain and unambiguous, and, therefore, should have been construed by the court utilizing traditional tools of construction to ascertain congressional intent. Therefore, deference was unwarranted.

CONCLUSION

For the foregoing special and important reasons, the petitioner submits that the Court should entertain argument concerning the applicability of the judicial deference doctrine to a substantive revenue statute within the jurisdiction of a specialized federal court. Also, the court should resolve conflict between the circuits concerning the interpretation of its leading decisions on the judicial deference doctrine.

Respectfully submitted,

S. RICHARD SHOSTAK
ROBERT GLENN WHITE
STEIN SHOSTAK SHOSTAK AND O'HARA
Counsel of Record for Petitioner
3580 Wilshire Blvd., Suite 1240
Los Angeles, CA 90010
(213) 384-2850

JAMES A. GERAGHTY
DONOHUE AND DONOHUE
Co-counsel for Petitioner
26 Broadway - Suite 1111
New York, NY 10004
(212) 269-2330

November 10, 1989

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-1149

TEXAS APPAREL CO.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

S. Richard Shostak, Stein Shostak Shostak & O'Hara, of Los Angeles, California, argued for plaintiff-appellant.

Kenneth N. Wolf, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *John R. Bolton*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

James A. Geraghty, Donohue & Donohue, of New York, New York, was on the brief for Amicus Curiae, Aris Isotoner, Inc.

Appealed from: U.S. Court of International Trade

Chief Judge Re

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-1149

TEXAS APPAREL CO.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: August 15, 1989

Before MARKEY, Chief Judge, MAYER and MICHEL, Circuit Judges. PER CURIAM.

The United States Court of International Trade, in Texas Apparel Co. v. United States, 698 F. Supp. 932 (Ct. Int'l Trade 1988), held that the cost or value of sewing machines "used in the production of the imported merchandise," including their repair parts and the cost of repairs, was properly included by the United States Customs Service in the computed value of imported men's, women's, and boys' jeans as an "assist" under 19 U.S.C. § 1401a(h)(1)(A)(ii) (1982). Texas Apparel Co. has shown no error in Chief Judge Re's thorough and well-reasoned analysis which specifically, seriatim, and correctly disposes of each of appellant's arguments. Accordingly, that decision of the Court of International Trade, dated October 25, 1988, is

AFFIRMED.

Slip Op. 88- 148

UNITED STATES COURT OF INTERNATIONAL TRADE

TEXAS APPAREL CO.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Before:
RE, CHIEF JUDGE

Court No.
82-05-00618

Memorandum Opinion and Order

The Customs Service appraised or valued certain wearing apparel, imported from Mexico, upon the basis of computed value, pursuant to 19 U.S.C. § 1401a(e). Plaintiff contests the inclusion in the appraised value of the cost or value of sewing machines, repair parts, and the cost of repairs as an "assist" under 19 U.S.C. § 1401a(h)(1)(A)(ii). Plaintiff and defendant move for summary judgment.

Held: The court concludes that there are no material issues of fact in dispute. Since the Customs Service properly appraised or valued the imported merchandise, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

[Plaintiff's motion for summary judgment is denied; defendant's motion for summary judgment is granted.]

Dated: October 25, 1988

Stein Shostak Shostak & O'Hara (S. Richard Shostak at oral argument and on the brief and Robert Glenn White on the brief), for plaintiff.

John R. Bolton, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (Kenneth N. Wolf at oral argument and on the brief), for defendant.

RE, Chief Judge: The question presented in this case pertains to the proper appraisement or valuation, for customs purposes, of 266 entries of certain wearing apparel imported from Mexico between July 1, 1980 and May 29, 1981. The Customs Service appraised the merchandise on the basis of computed value, pursuant to section 402(e) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 201(a), 93 Stat. 194 (codified as amended at 19 U.S.C. § 1401a (1982)). The appraised value of the wearing apparel included an addition for the cost or value of sewing machines, including their repair parts and the cost of repairs, as an "assist" under 19 U.S.C. § 1401a(h)(1)(A)(ii).

Plaintiff contests the inclusion in the appraised value of the cost or value of the sewing machines as dutiable assists, and contends that 19 U.S.C. § 1401a(h)(1)(A)(ii) does not include general purpose machinery as assists. It maintains that "the only production equipment included as assists are the 'tools, dies, molds, and similar items . . .' which are special purpose equipment having the dedicated and exclusive function of producing the discrete article in question." Specifically, plaintiff claims that the sewing machines are "general purpose equipment," and are not "tools, dies, molds, and similar items used in the production of the imported merchandise." Hence, plaintiff contends that the appraisement of the imported merchandise should not have included an addition for the cost or value of the sewing machines,

and seeks a refund of the excessive duties paid, with interest.

Computed value is defined in 19 U.S.C. §1401a(e) as follows:

> (1) The computed value of imported merchandise is the sum of—
>
> (A) the cost or value of the materials and the fabrication and other processing of any kind employed in the production of the imported merchandise;
>
> (B) an amount for profit and general expenses equal to that usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by the producers in the country of exportation for export to the United States;
>
> (C) any assist, if its value is not included under subparagraph (A) or (B); and
>
> (D) the packing costs.

Id.

An "assist" is defined in 19 U.S.C. §1401a(h)(1)(A) as follows:

> As used in this section—
>
> (1)(A) The term "assist" means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:
>
> (i) Materials, components, parts, and similar items incorporated in the imported merchandise.
>
> (ii) Tools, dies, molds, and similar items used in the production of the imported

merchandise.

(iii) Merchandise consumed in the production of the imported merchandise.

(iv) Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

Id. (emphasis added).

The question presented is whether the cost or value of the sewing machines, repair parts, and the cost of repairs were properly included by the Customs Service in the computed value of the imported merchandise as an "assist" under 19 U.S.C. § 1401a(h)(1)(A)(ii).

Pursuant to 28 U.S.C. § 2639(a)(1)(1982), the decision of the Customs Service is presumed to be correct, and the burden of proof is upon the party challenging the decision.

Contending that there are no material issues of fact in dispute, both parties moved for summary judgment pursuant to Rule 56 of the Rules of the United States Court of International Trade. Upon examining the relevant statutes and supporting papers, the court concludes that there are no material issues of fact in dispute, and that plaintiff has not overcome the presumption of correctness that attaches to the Customs Services' determination. Consequently, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-

48 (1986). The court may not resolve or try factual issues on a motion for summary judgment; it may only "determine whether there is a genuine issue for trial." Id. at 249; Yamaha Int'l Corp. v. United States, 3 CIT 108, 109 (1982). In ruling on cross-motions for summary judgment, if no genuine issues of material fact exist, the court must determine whether either party is "entitled to judgment as a matter of law." See U.S.C.I.T. R. 56(d); United States v. B.B.S. Elecs. Int'l Inc., 9 CIT 561, 566, 622 F. Supp. 1089, 1094 (1985).

Plaintiff contends that the term "assist," defined in 19 U.S.C. § 1401a(h)(1)(A)(ii), as "[t]ools, dies, molds, and similar items used in the production of the imported merchandise," should be construed strictly to encompass only equipment of a specialized nature that is used to produce the particular merchandise. According to plaintiff, the sewing machines in issue are capable of serving diverse functions for the manufacture of a wide variety of articles, and, therefore, are general purpose equipment that cannot be equated with "tools, dies, molds, and similar items." Hence, plaintiff maintains that it "was error to include the value of such general purpose machinery, sewing machines, in calculating the computed value of the wearing apparel . . . ."

Defendant disagrees, and maintains that including an amount for the cost or value of "sewing machines in the appraised computed value of the merchandise is correct as a matter of law, regardless of whether the 'sewing machines' are within the statutory definition of 'assists.' " Defendant contends that, under the provisions of 19 U.S.C. § 1401a(e), the sewing machines are includable in computed value because they are an integral part of the "processing . . . employed in the production of the imported merchandise . . . ." See 19 U.S.C. §

1401a(e)(1)(A). In the alternative, defendant maintains that pursuant to 19 U.S.C. § 1401a(e)(1)(B), the cost or value of the sewing machines must be part of the "profit and general expenses" of the wearing apparel. Furthermore, defendant submits that the legislative history of the Trade Agreements Act demonstrates that the term "assist," as defined in 19 U.S.C. § 1401a(h)(1)(A)(ii), has a broad and expansive meaning which encompasses the sewing machines in issue.

It is evident from the submissions that there is no material issue of fact in dispute, but rather, only an issue of law. Namely, the parties are in disagreement as to whether the cost or value of the sewing machines, including their repair parts and cost of repairs, was properly included in the computed value of the imported merchandise as an "assist" pursuant to 19 U.S.C. § 1401a(e)(1)(C) and § 1401a(h)(1)(A)(ii). More specifically, the parties disagree as to whether the sewing machines, repair parts, and the costs of repairs constitute an "assist," which, in 19 U.S.C. § 1401a(h)(1)(A)(ii), is defined as "tools, dies, molds, and similar items used in the production of the imported merchandise."

On judicial review, the fundamental question presented is whether, based upon the statutory language and the legislative intent which underlies the pertinent statutory provision, the interpretation of the statute by the Customs Service was reasonable.

It is axiomatic that statutes are to be interpreted so as to carry out the underlying legistive policy and intent. See Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). It is also clear that "the starting point for interpreting a statute is the language of the statute itself." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102,

108 (1980). If a statute is silent or ambiguous on a particular question, it is appropriate for the court to accord deference to the agency's interpretation of the statute if the interpretation is reasonable and consistent with the legislative intent. See Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 233 (1986).

Plaintiff maintains that "the intent of the legislature to limit the definition of assists to specialized items . . . is evident from the history of the Trade Agreements Act of 1979, from the adoption and usage of the phrase 'tools, dies, molds,' and from the demonstrated concept and scheme of the new value code." It contends that the goal of the code is to value goods based on "actual foreign expenditures," rather than "all costs expended" in producing the merchandise, and, therefore, adjustments made under computed value must be "strictly limited to those set out in the code." According to plaintiff, the "only equipment 'used in the production of the imported merchandise' the cost or value of which is dutiable as an assist consists of 'tools, dies, molds' and items 'similar' thereto." (emphasis in original). Hence, plaintiff submits that it does not include general purpose machinery such as sewing machines.

An examination of the legislative history of the Trade Agreements Act reveals that Congress did not intend as narrow or restrictive a view of computed value, or of the term "assist," as suggested by plaintiff. The legislative history of the Trade Agreements Act of 1979 indicates that the Act "revise[s] section 402 of the Tariff Act of 1930, which specifies the methods for determining the value of an import for purposes of applying ad valorem duties, to make it consistent with the Customs Valuation Agreement negotiated in the [Mutilateral Trade Negotiations]." S. Rep. No. 249, 96th Cong., 1st

Sess., reprinted in 1979 U.S. Code Cong. & Admin. News 381, 406. The amended version of section 402 contains five methods of customs valuation including computed value which is "based on production costs, profit and overhead." H.R. Rep. No. 317, 96th Cong., 1st Sess. 79 (1979).

The Report of the House Committee on Ways and Means (House Report) states that the computed value standard under the amended section 402 "conceptually follows the constructed value standard . . . and the cost of production standard" under the former section 402. See id. at 94. Pursuant to the present section 402(e), the computed value of imported merchandise includes "any assist," which is defined in the present section 402(h)(1)(A). The House Report states that an "assist" is:

> a concept which, while taking on greater significance in customs valuation, has never before been defined by statute. The definition specifies those particular items or services which, when supplied directly or indirectly by the buyer of the imported merchandise, free of charge or at reduced cost, for use in connection with the production or the sale for export to the United States, are to be treated as an assist.

Id. at 81; see also S. Rep. No. 249, 96th Cong., 1st Sess., reprinted in 1979 U.S. Code Cong. & Admin. News at 407. According to the House Report, a goal of the new valuation code is "to ensure that these new rules are fair and simple, conform to commercial reality, and allow traders to predict, with a reasonable degree of accuracy, the duty that will be assessed on their products." H.R. Rep. No. 317, at 79.

It is evident that the aim of the new valuation scheme is to establish a uniform, fair, and greatly simplified system for the valuation of imports in order to reduce non-tariff barriers to trade and to promote international trade. See id. at 94. As stated in the legislative history, the computed value standard was developed to aid Customs and the importer in determining customs value. See id. The new code simplifies valuation since it "confines the computed value standard to the cost of producing the imported merchandise . . . ." Id. Accordingly, the Custom Service's interpretation of 19 U.S.C. § 1401a(h)(1)(A)(ii) as including items directly related to the production of merchandise, such as a sewing machine to the sewing of wearing apparel, cannot be said to be contrary to the goals and intent of the new valuation code. Including the value of the sewing machine, which is essential to the fabrication of the apparel, fairly and accurately reflects "the cost of producing the imported merchandise."

Plaintiff contends that the legislative intent of section 1401a(h)(1)(A)(ii) was to exclude general purpose machinery from the definition of items similar to "tools, dies, molds." For support, plaintiff refers to a questionnaire sent by the Regional Commissioner of Customs describing the scope of assists as not including general purpose machines. Hence, plaintiff contends that Customs' change in policy in 1980, to include general purpose machinery in its definition of assists, is erroneous. Defendant, however, points out that the questionnaire cited by plaintiff "did not reflect the position of the Customs Service," but was a "document generated by a regional office." (emphasis in original).

Defendant stresses that the Customs Service, in interpreting the statute, has differentiated between those general purpose machines which are used in the actual

production of the specific imported article, and those that are not used in the actual production of the merchandise. Indeed, the Customs Service has specifically interpreted the statute to include "general purpose equipment, such as sewing machines, ovens, drill presses, etc., . . . used abroad in the production of merchandise imported into the United States, [as] dutiable under section 402 (h)(1)(A)(ii)." See C.S.D. 81-186, 15 Cust. B & Dec. 1099, 1100. On the other hand the Customs Service has held that "air-conditioning equipment, a power transformer, telephone switching equipment and emergency generators do not fall within the definition of assist, as they are not used in the production of the merchandise." Id. at 1101. Customs' interpretation clearly distinguishes between machinery which works directly on the merchandise or contributes directly to its manufacture, e.g., sewing machines, drill presses and ovens, and machinery which although used by the industry is not used directly in the production of the merchanise itself, e.g., air-conditioners and emergency generators.

It is well settled that the court will defer to the agency's interpretation of the statute if the interpretation is reasonable, and is consistent with the legislative intent and guiding purpose of the statute. See Chevron U.S.A. Inc., 467 U.S. at 843-44. Machinery such as air-conditioning and power generators, which may be used by manufacturers and may be invaluable, is not used directly to produce the merchandise. The sewing machines in issue, however, are used directly "in the production of the imported merchandise." Hence, the court concludes that Customs' interpretation of the statute is reasonable and consistent with congressional intent.

Citing the canon of construction of ejusdem generis, plaintiff contends that general purpose equipment such as sewing machines is not similar to "tools, dies, [and] molds." See Nomura (America) Corp. v. United States, 62 Cust. Ct. 524, 530, C.D. 3820, 299 F. Supp. 535, 540 (1969), aff'd, 58 CCPA 82, C.A.D. 1007, 435 F.2d 1319 (1971). According to plaintiff tools, dies, and molds "are all devices employed for their discrete form and function to shape or work on a material, either manually or by being installed in a powered machine to mechanically emulate the same manual application." It asserts that " 'similar items used in the production of the imported merchandise' must possess the essential characteristics or purposes of the exemplar items." Thus, plaintiff maintains that "the needles, holders, cams, [and] die slides" are similar to tools, dies, molds, and not the sewing machines, as they are actually "tool holders."

Defendant replies that plaintiff's definition of tools, as the parts of machines that perform specific cutting or forming, is too restrictive. Defendant defines the term tool more broadly as "an implement used to modify raw materials for human use." See 26 Encyclopedia Americana 841 (1973). It maintains that "[t]he term 'similar items used in the production of the imported merchandise' was intended to encompass precisely what it states—to include as assists all production equipment and machinery that were used to produce the imported merchandise." The defendant explains that the limiting language of the statute was necessary because "there are many articles the buyer may provide the seller which do not work on the merchandise, per se, but are directly utilized 'for use in connection with the production of merchandise.' " (emphasis in original). As examples the defendant refers to articles which are not similar to tools, dies or molds but are nevertheless used generally in the

production of merchandise, such as motors, generators, and computers.

In interpreting section 1401a(h)(1)(A)(ii) it is helpful to ascertain whether the sewing machines essentially or principally perform the same function as tools. In the case of Durst Indus. v. United States, 73 Cust. Ct. 160, C.D. 4568 (1974), the court faced a similar question. Durst involved the dutiable status of two types of water faucets, centerset and combination, which were classified under 680.20, TSUS, which provided for "[t]aps, cocks, valves, and similar devices, however operated, used to control the flow of liquids . . . ." See Durst, 73 Cust. Ct. at 162. Plaintiff urged that the articles were not within the common meaning of "taps," "cocks," or "valves" and were not similar to these items. Id. at 164. The court held that the combination faucets were within the meaning of "taps," "cocks," or "valves." Id. at 167. The court also held that the centerset faucets were "ejusdem generis with taps, cocks and valves" because taps, cocks and valves control the flow of liquids, which was their common function and since the imported articles functioned primarily to control the flow of liquids, they were similar devices to taps, cocks, and valves within item 680.20, TSUS. See id.

In the present case, the function performed by the sewing machines, which is to construct the apparel by sewing together the fabric, is essentially or principally the same as that of a tool, die, or mold. Although a tool may be defined as plaintiff suggests, as a manual instrument, a tool may also be defined more broadly as "an implement or object used in performing an operation or carrying on work of any kind . . ." See Websters Third New International Dictionary 2408 (1981). It is clear, therefore, that in this industry a sewing

machine is a device similar to a "tool, die, [or] mold . . . used in the production of the imported merchandise."

In view of the foregoing, the court holds that the cost or value of the sewing machines, repair parts, and the cost of repairs were properly included by the Customs Service in the computed value of the imported merchandise as an "assist" under 19 U.S.C. § 1401a(h)(1)(A)(ii). Accordingly, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

Edward D. Re
Chief Judge

Dated: New York, New York
October 25, 1988

JUDGMENT

Before: RE, CHIEF JUDGE

Court No. 82-05-00618

This case having been duly submitted for decision, and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED: that plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted; and this action is dismissed.

Edward D. Re
Chief Judge

Dated: New York, New York
October 25, 1988

NOTICE OF ENTRY AND SERVICE OF ORDER

Please take notice that this is a copy of an order rendered in this action which was entered in the office of the Clerk of the Court and served upon the parties on the date shown below.

Dated: OCT 25 1988

Joseph E. Lombardi,
Clerk of the Court

By: _____

Deputy Clerk

Date: September 4, 1980
File: CLA-2: RRUCV
542122 TLL
TAA 4

This is in reply to your letter dated April 26, 1980, requesting a ruling with respect to the scope of the term "assists" as contained in title II of the Trade Agreements Act of 1979 (TAA). Specifically, you wish to obtain confirmation that certain assist costs which presently may be dutiable as assists, will no longer be dutiable under TAA. The assist costs which are the subject of this request are:

1. Management services, accounting services, legal services, and other services related to imported merchandise rendered abroad or in the United States by persons paid by their U.S. employers, and

2. General purpose equipment, such as sewing machines, ovens, drill presses, etc., furnished free of charge or at reduced cost used abroad in the production of merchandise imported into the United States.

In addition you ask whether these nondutiable costs are to be reportable to Customs.

In response to your assist questions, it is important to recognize in the context of transaction value that only those items specifically referred to in section 402(b)(1) may be added to the price actually paid or payable when not otherwise included within the price. These items referred to in section 402(b)(1) are:

(A) The packing costs incurred by the buyer with respect to the imported merchandise;

(B) Any selling commission incurred by the buyer with respect to the imported merchandise;

(C) The value, apportioned as appropriate, of any assist;

(D) Any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and

(E) The proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

Insofar as the term "assist" is concerned, section 402(h)(1)(A) provides:

(h) DEFINITIONS.—As used in this section—

(1)(A) The term "assist" means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:

(i) Materials, components, parts, and similar items incorporated in the imported merchandise.

(ii) Tools, dies, molds, and similar items used in the production of the merchandise.

(iii) Merchandise consumed in the production of the imported merchandise.

(iv) Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

Therefore, it is the position of the U.S. Customs Service that those items set forth in paragraph No. 1 of your letter, that is—

> 1. Management services, accounting services, legal services, and other services related to imported merchandise rendered abroad or in the United States by persons paid by their U.S. employers,

would not be added to the price actually paid or payable in order to determine transaction value for imported merchandise. However, if the price actually paid or payable includes a charge for these items, no authority exists in section 402(b)(3), or elsewhere, to remove them from the price actually paid or payable.

Insofar as the items contained in paragraph No. 2 of your letter are concerned, that is—

> 2. General purpose equipment, such as sewing machines, ovens, drill presses, etc., furnished free of charge or at reduced cost used abroad in the production of merchandise imported into the United States.

it is the position of headquarters, U.S. Customs Service, that these items are properly dutiable under section 402(h)(1)(A)(ii). Instructions toward that end were sent to field offices on July 2, 1980.

Your incoming letter includes reference to section 10.19 of the Customs Regulations which describes the proper allocation between costs of fabrication and general expenses. As you know, one of the major thrusts of the TAA is the emphasis on generally accepted accounting principles. Under this new law, Customs will no longer possess the authority to reject information submitted on the basis of the accounting method by which that information was prepared. Therefore, it is

our position that section 10.19 is not relevant to those appraisements made under the Trade Agreements Act of 1979.

Insofar as the continued reporting of these costs to Customs is concerned, Customs does not intend to burden importers with the requirement of submitting unnecessary cost information, so that it is not our present intention to require cost information relating to those items listed in paragraph No. 1 of your letter. This of course is to be distinguished from those situations in which Customs has a legitimate interest in learning the duty consequences of the particular transaction under scrutiny. For instance, when the question of 402(h)(1)(A)(iv) arises, Customs should be advised that certain engineering, development, artwork, etc., was undertaken within the United States and is therefore, not to be added to the price actually paid or payable.

Therefore, in order for us to make the conclusion that the particular item undertaken was not to be added to the price because it was undertaken in the United States, we have to possess the opportunity to examine it.

Date: October 15, 1980
File: CLA-2:RRUCV
542139 TLL
TAA #9

This is in reply to your letter dated May 22, 1980, seeking the uniform application of the term "assists" throughout section 402, Tariff Act of 1930, as amended by the Trade Agreements Act of 1979. Specifically, you are concerned that certain assist costs which were formerly dutiable under the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, but which are not to be added to the price actually paid or payable as an assist because of the language of section 402(h)(i)(A), could be added to computed value as either cost of materials and fabrication or as a general expense under section 402(e)(i). Your letter of April 26, 1980, states that you are concerned with the following particular costs:

(1) Management services, accounting services, legal services, and other services related to imported merchandise rendered abroad or in the United States by persons paid by their U.S. employers; and

(2) General purpose equipment, such as sewing machines, ovens, drill presses, etc., furnished free of charge or at reduced cost used abroad in the production of merchandise imported into the United States.

In responding to your inquiry, we would like to make reference to our recent letter to you dated September 4, 1980, in which we pointed out that those items included in paragraph 2, that is, sewing machines, ovens, drill presses, etc., were properly includable as "assists" under section 402(h)(i)(A) when furnished free of charge or at a reduced cost by the buyer for use in connection

with the production of merchandise imported into the United States.

In addition, we wish to emphasize that one of the changes created by the latest amendment of section 402 is the use of generally accepted accounting principles (see sec. 402(g)(3)). Accordingly, the response to your question must take into account the generally accepted accounting principles of the country of production or exportation in the case of computed value. This of course, would require a case-by-case analysis. However, we can say that those items which were formerly treated as dutiable assists, but which are not to be treated as assists under 402(h)(i)(A), will not be added in as part of computed value, as long as such treatment is in accordance with the relevant generally accepted accounting principles.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of Pasadena, California; a member of the Bar of the United States Supreme Court and an attorney representing the Petitioner in this matter; that my business address is 3580 Wilshire Boulevard, Suite 1240, Los Angeles, California 90010; and that on November 10, 1989, I served the within ***Petition for a Writ of Certiorari*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Joseph I. Liebman, Esq.
Attorney in Charge
International Trade Field Office
Commercial Litigation Branch
U.S. Department of Justice
26 Federal Plaza
New York, New York 10278

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 10, 1989, at Los Angeles, California.

Robert Glenn White
(Original signed)